SEP 27 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 446

MARVIN DAYAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

MARVIN DAYAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered July 24, 1961, affirming the judgment of dismissal of the United States District Court, Southern District of California, Central Division, denying the Petition of Marvin Dayan, a chiropractor, for a petition for a writ of habeas corpus in his collateral attack on his state conviction for an alleged violation of Section 2141, California Business and Professions Code (Medical Practice Act).

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals has not been printed in the official reporter and the text of the opinion and judgment is found in Appendix A at pages 1 and 2 of the Appendices.

The opinion of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles is not reported but appears on pages 40 and 41 of the printed record. The order of the Appellate Department of the Superior Court denying the petition for rehearing is set forth in the printed record at pages 42 and 43.

JURISDICTION.

1. Jurisdiction of the Supreme Court.

The judgment of the Court of Appeals was made and entered July 24, 1961, and is set forth in the certified record and in Appendix A at page 2 of the Appendices.

A petition for rehearing was denied without opinion on August 29, 1961, the text of the order is set forth in the certified record and Appendix B at pages 3 of the Appendices.

No order has been made granting an extension of the time within which to petition for a writ of certiorari, but the Court of Appeals made its order staying the issuance of its mandate pending final review of this Court on condition that this Petition be filed in the Clerk's office of this Court by October 1, 1961.

A copy of said order is set forth in the certified record and in Appendix B at pages 3 and 4 of the Appendices.

Jurisdiction of the Supreme Court of the United States is based on 28 U. S. C. Section 1254(1).

2. Jurisdiction of the Court of Appeals.

Jurisdiction of the Court of Appeals to review the decision of the United States District Court is based on the premise that the order discharging the order to show cause and the judgment of dismissal is an appealable order and all steps to perfect the appeal were taken in accordance with the Rules of Appeal and Federal Rules of Civil Procedure.

Rules of Appeal:

Rule 8, 10, 17, 18, 19, 20, 21

Federal Rules of Civil Procedure:

28 U. S. C. Sections 1291 and 2253

Pleadings Showing the Existence of Jurisdiction:

1. Request for Certificate of Probable Cause and Certificate of Probable Cause Printed Record —pages 93 and 94.

2. Notice of Appeal Printed Record—page 98.

3. Motion to Extend Time to File Record and Docket Appeal. Rule 73g and Order Printed Record—pages 98 and 99.

4. Clerk's Certificate certifying transcript and record on appeal Printed Record—pages 101 and 102.

5. Appellant's Statement of Points and Designation of Record to be Printed. Printed Record—pages 103 to 105 inclusive.

3. Jurisdiction of the United States District Court.

Jurisdiction of the District Court is based on the pleadings, consisting of a Petition for Writ of Habeas Corpus filed in the District Court to release Appellant from the custody of the Chief of Police of the City of Los Angeles, County of Los Angeles, State of California, where he was unlawfully imprisoned for an alleged conviction for the violation of Section 2141 of the California Business and Professions Code (West's Annotated), a misdemeanor, and the fact that if the Writ had not been granted Appellant would have been forced to serve out a good portion of his sentence in jail before the violation of his constitutional rights as alleged in the Petition could be passed upon by the United States Supreme Court and the United States District Court.

That all of the California State Courts, to wit, the Municipal Court of Los Angeles Judicial District which tried him, the California District Court of Appeal and the California State Supreme Court, refused to either release Appellant from custody or stay execution of his sentence until he could seek a review by appeal or certiorari from the Supreme Court of the United States as the highest appellate court in the State judiciary.

That the only available court open to Appellant which could afford immediate relief to Appellant and prevent his unlawful sojourn in custody was the United States District Court in which the Petition was filed.

That the statutory provisions believed to sustain the jurisdiction of the United States District Court are Sections 1651 and 2241-2243, 28 U. S. C. and Sections 2246 to 2249 and Sections 2251 and 2254, 28 U. S. C. Also Rules 1 and 81a, Federal Rules of Civil Procedure, 28 U. S. C.

QUESTIONS PRESENTED.

1. Can a doctor of chiropractic, holding an unrevoked license from the California Board of Chiropractic Examiners to practice a healing art be prosecuted for a violation of Section 2141, California Business and Professions Code (Medical Practice Act), defining as a crime all persons who practice a healing art without a license from either the California Board of Medical Examiners or the California Board of Osteopathic Examiners?

2. Can the State Courts, in order to validate Section 2141, read into the language of Section 2141 an exception to the effect that a doctor of chiropractic holding an unrevoked license from the California Board of Chiropractic Examiners and who practices within the scope of his license has a complete defense to a complaint charging him with a violation of Section 2141?

3. Does not the fact that the California State Legislature failed to amend Section 2141, formerly Section 17 of the Medical Practice Act of 1913, to add licentiates of the Chiropractic Board to the exempted classes named in Section 2141 render the section void in view of Section 18 of the Chiropractic Act repealing all acts inconsistent with the Chiropractic Act, which is an initiative act and enacted by the people taking precedence over acts of a legislature?

4. Did not the failure of the Legislature to amend Section 2141 also render the Section void as violating Section 1 of the Fourteenth Amendment to the United States Constitution for the reason that it is an unreasonable and discriminatory classification of the professions engaged in the healing arts which are licensed by three state boards of equal dignity?

5. Inasmuch as Section 2141 does not charge as a crime the *practice of medicine or surgery* nor the use of drugs or medicine now or hereafter included in *materia medica,* how could petitioner be charged with a violation of 2141 on the theory presented by respondent and adopted by the Court of Appeals that he was guilty of "practicing a little medicine" not allowed by his license?

The penalty for violating his chiropractic license is found in Section 15 of the Chiropractic Act and the limits of his license is found in Section 7 of the Chiropractic Act as modified by Sections 5 and 6 of the Act.

6. Assuming that the complaint in this case charged a violation of Section 2141, did not the trial court only have jurisdiction to dismiss the complaint upon the introduction into evidence by the defense of the unrevoked license of the petitioner issued by the California Chiropractic Board?

7. If the trial court did have jurisdiction to try the petitioner after the introduction into evidence of his license, was he accorded any trial at all because of the refusal of the trial court to permit petitioner to introduce evidence on his own behalf which if introduced would have established a *prima facie* defense requiring the prosecution to move forward to negate said defense in order to prove him guilty of violating his chiropractic license?

STATUTES INVOLVED.

The texts of the Statutes involved not herein set out in full will be found in Appendix D.

State Statutes.

Section 2141, California Business and Professions Code, (West's Annotated California Code), Added Stats. 1937, c. 414, p. 1377, reads as follows:

> "Practice, attempt or advertising without certificate as misdemeanor. Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

The above Section, hereinafter referred to as 2141, is a codification of Section 17 of the California Medical Practice Act, Stats. 1913, c. 354, p. 734, Section 17; Stats. 1915, c. 105, p. 199, Section 13; Stats. 1917, c. 81, p. 114, Section 11; Stats. 1929, c. 233, p. 435, Section 1; Stats. 1933, c. 499, p. 1276, Section 2.

Section 2426, California Business and Professions Code (West's Annotated California Codes), added Stats. 1937, c. 414, p. 1377, reads as follows:

> "Section 2426. *Violation as misdemeanor; punishment.* Unless it is otherwise expressly provided, any person, who violates any provision of this chap-

ter, is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars nor more than six hundred dollars or by imprisonment for a term of not less than sixty days nor more than one hundred either days or by both such fine and imprisonment. (Added Stats. 1937, c. 414, p. 1377). Derivation: Stats. 1913, c. 354, p. 722, §24, added Stats. 1917, c. 81, p. 115, §13, amended Stats. 1927, c. 92, p. 181, §1; Stats. 1931, c. 534, p. 1139, §2."

Section 7 of the California Chiropractic Act, an initiative measure adopted in 1923 by the People of the State of California (Stats. of 1923, Sec. 7, p. xxii, set forth in West's Annotated California Codes as Section 1000-7), and which reads as follows:

"License to practice, issuance; practice authorized. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated 'License to practice chiropractic,' which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygenic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

Section 18 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxv, Sec. 18) referred to Section 1000-18 above is found in West's Annotated California Codes as Section 10000-18 and reads as follows:

"Repeal of conflicting provisions in medical practice act. Nothing herein shall be construed as repealing the 'medical practice act' of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed."

Section 1000, Business and Professions Code (West's Annotated Code), Stats. 1937, c. 399, p. 1241, is as follows:

"Law governing. The law governing practitioners of chiropractic is found in an initiative act entitled 'An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation hereof, and repealing all acts and parts of acts inconsistent herewith', adopted by the electors November 7, 1922."

Section 4 of the Chiropractic Act, Initiative Measure, Stats. 1923, p. xxi, Sec. 4, referred to in Section 1000 above, is found in West's Annotated California Codes as Section 1000-4.

The text of Section 4 is set out in Appendix D at page 12 of Appendices.

Section 5 of the Chiropractic Act, Initiative Measure, Stats. 1923, p. xxi, Section 5, referred to in Section 1000 above, is found in West's Annotated California Codes as Section 1000-5.

The text of Section 5 is set out in Appendix D at page 13 of Appendices.

Section (c) of Section 6 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxii, Sec. 6), referred to in Section 1000 above, is found in West's California Annotated Codes as Section 1000-6(c).

The text of Section 6, paragraph (c) is set out in Appendix D, page 15 of the Appendices.

Section 13 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxiv, Sec. 13) referred to in Section 1000 above is found in West's California Annotated Codes as Section 1000-13.

The text of Section 13 is set forth in Appendix D at page 15 of Appendices.

Section 15 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxiv, Sec. 15) referred to in Section 1000 above is found in West's Annotated California Codes as Section 1000-15.

The text of Section 15 is set forth in Appendix D at page 16 of Appendices.

Section 17 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxv, Sec. 17) referred to in Section 1000 above is found in West's Annotated California Codes as Section 1000-17.

The text of Section 17 is set forth in Appendix D at page 17 of Appendices.

Section 1001 of Business and Professions Code (Added Stats. 1945, c. 623, p. 1165, Sec. 1, as amended 1951, c. 426, p. 1404, Sec. 1), is found in West's Annotated California Codes, as Section 1001.

The text of Section 1001 is set forth in Appendix D at page 17 of Appendices.

Federal Statutes.

The text of the following Federal Statutes are found in Appendix D at the pages of Appendix:

28 U. S. C. Sec. 1254 (1)
28 U. S. C. Sec. 1291
28 U. S. C. Sec. 1651 (a)
28 U. S. C. Sec. 2241 (a)(c)(3)

The following Federal Statutes are relied on but not set forth in the Appendix or in the body of the Petition:

28 U. S. C. Sec. 2242
28 U. S. C. Sec. 2243
28 U. S. C. Sec. 2246
28 U. S. C. Sec. 2247
28 U. S. C. Sec. 2248
28 U. S. C. Sec. 2249
28 U. S. C. Sec. 2253

Constitutions.

Section 1 of the 14th Amendment to the Constitution of the United States, which reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." West's Annotated California Codes, Volume 3, pp. 802, 803.

Article I, Section 11 of the California Constitution which reads as follows:

> "Sec. 11. All laws of a general nature shall have a uniform operation." West's Annotated California Codes, Volume 3, p. 523.

Article I, Section 13 of the California Constitution which reads as follows:

> "Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)" West's Annotated California Codes, Volume 3, p. 524.

Rules.

Federal Rules of Civil Procedure, Rule 1, 28 U. S. C.

Federal Rules of Civil Procedure, Rule 81, U. S. C.

Rules 21, 22, 23 of the Supreme Court of the United States.

Federal Rules of Civil Procedure 19, 21, 23, 28 U. S. C.

STATEMENT OF THE CASE.

This case involves the California Medical Practice Act of 1913 as amended and the Chiropractic Initiative Act adopted by the People of California in 1922 as amended in 1945, and in particular Section 2141, California Business and Professions Code, being a codification of Section 17 of the Medical Practice Act of 1913.

Also involved is Section 2426 of the California Business and Professions Code, a section of the Medical Practice Act.

The case also involves the denial of the civil rights and the Constitutional rights of petitioner under Section 1 of the 14th Amendment of the United States Constitution, and Sections 11 and 13 of Article I of the California State Constitution.

Inasmuch as this is a collateral attack by a Writ of Habeas Corpus upon a state conviction of petitioner the stage in the proceedings in the state court of first instance and in the state appellate court at which, and in the manner in which the federal questions sought to be reviewed were raised is hereinafter set forth.

The constitutional question was presented in time and was raised at all steps of the proceedings in the

State courts, to wit, by demurrer in the trial court, by offers of evidence rejected and by jury instructions given on motion of the trial court, in the Appellate Department of the Superior Court by the Statement on Appeal and Briefs filed, by the Memorandum Opinion of the Court, and the Certificate of the Presiding Judge of the Appellate Court.

There are no independent grounds existing upon which the State Courts could have found the petitioner guilty without considering the constitutional question and violating petitioner's constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Federal questions, being the denial to petitioner of due process of law and the denial of equal protection of the law guaranteed to petitioner by the 14th Amendment to the Constitution of the United States, was raised at all pertinent steps of the proceeding in the State Court by:

(a) The complaint, pages 32-35, Printed Record.

(b) Offers of proof by petitioner of evidence necessary to his defense, which offers were rejected by the trial court and were not considered by the jury. Printed Record, pages 44-46, 48-49, 51-53, 57-58, 59-60, inclusive.

(c) Statement on Appeal. Printed Record, pages 36-40.

(d) Instructions to Jury on motion of court. Printed Record, pages 62-64.

(e) Petition for Writ of Habeas Corpus. Printed Record, pages 3-12.

(f) Memorandum Opinion of Appellate Department of Superior Court. Printed Record, pages 40-42.

The petitioner is not held in custody by virtue of any complaint, indictment, presentment, warrant or quarantine law, rule regulation, arrest or order, with the exception of the judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, aforesaid. Printed Record page 31.

Petitioner was at the time of his arrest and now is, a doctor of Chiropractic licensed to practice Chiropractic as taught in Chiropractic Schools or Colleges and also to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body but is not authorized to practice medicine, surgery, osteopathy, dentistry or optometry, nor use any drugs or medicine now or hereafter included in *materia medica*.

Set out below is a copy of petitioner's license:

"LICENSE TO PRACTICE CHIROPRACTIC

To Whom These Presents Shall Come, Greetings: MARVIN S. DAYAN, D. C., having qualified by law, is by this Certificate authorized to practice Chiropractic in the State of California as taught in chiropractic schools or colleges; and is also authorized to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body as provided by law.

In Testimony Whereof, The State Board of Chiropractic Examiners has granted this License to Practice Chiropractic and caused same to be signed and its seal hereto affixed, this 28th day of May, A. D. 1943.

RAYMOND C. LIESER, D.C.
President
Winston Snow Gibson, D.C.
Vice President
Edward C. Paulsen, D. C.
Secretary
Thomas J. Earley, D. C."
(Printed Record page 65)

Petitioner was arrested for an alleged violation of Section 2141 of the California Business and Professions Code, a misdemeanor, which Section does not apply to Chiropractors. Section 2141 of the California Business and Professions Code, which is a codification of Section 17 of the California Medical Practice Act of 1913 as amended, reads as follows:

"Practice, attempt or advertising without certificate as misdemeanor. Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

Petitioner was released on bail and before trial, filed applications for Writs of Habeas Corpus to the Superior Court of the State of California, and the Supreme Court of the State of California, which Writs were denied. Printed Record, pages 24 to 26, inclusive.

Petitioner was unlawfully tried by the Municipal Court of Los Angeles Judicial District, before a jury, Honorable Parks Stillwell, Judge presiding, and was convicted on all three counts. Printed Record pages 26, 78, 79, 83-88 inclusive. Note: Pages 78, 79, 83-88 are folded pages.

Petitioner after said trial moved for a new trial which was denied and then was unlawfully sentenced to serve six months on Count I, and to pay a fine of $500.00 on both Counts II and III or to serve an additional 100 days on each of said Counts II and III consecutively, if the said fines were not paid. Petitioner previous to sentence orally applied for probation which motion was denied. Printed Record page 30.

Petitioner appealed from the conviction and from the orders denying the motion for new trial and motion for probation. Printed Record, pages 26, 27.

The Appellate Division of the Superior Court of the State of California, No. 98050, denied the appeal and affirmed the judgment. Printed Record page 27.

A petition for rehearing was filed and on March 14, 1960, the petition was denied. Printed Record page 27.

The remittitur was returned from the Appellate Division of the Superior Court on March 16, 1960, and the petitioner ordered to appear March 30, 1960, in Division 1 of the Municipal Court before Honorable Parks Stillwell, Judge presiding, and at the same time on motion of petitioner, execution of the judgment was stayed

until midnight, April 11, 1960, and petitioner released on his own recognizance. Printed Record page 27.

On April 6, 1960, petitioner filed an application for Writ of Habeas Corpus in the District Court of Appeal, Second District, and on April 11, 1960, said petition was denied without comment. Upon motion of petitioner the Honorable Parks Stillwell stayed execution of judgment until midnight, April 22, 1960, to permit petitioner to file an application with the Supreme Court of the State of California, for a Writ of Habeas Corpus. Printed Record pages 15-17. Said Petition for Writ of Habeas Corpus was denied by the Supreme Court of the State of California on April 20, 1960. Printed Record pages 5-6.

The stay of execution of sentence expired at midnight, April 22, 1960, Printed Record page 88 (folded page), and a request for extension being denied on said day, petitioner filed his Petition for a Writ of Habeas Corpus in the United States District Court, Southern District, Central Division, California, Printed Record pages 3 to 65 inclusive, and on said day the Honorable Peirson M. Hall, Judge, issued the Order to Show Cause returnable at 10 A.M., May 2, 1960, before the Honorable Leon R. Yankwich, and petitioner was thereupon released from cutody April 22, 1960. Printed Record page 66.

On April 29, 1960, Roger Arnebergh, City Attorney of Los Angeles, filed a motion to dismiss the writ and the matter was ordered set for 10 A.M., May 2, 1960. Printed Record pages 67-68 inclusive. The re-

turn on the Order to Show Cause was filed April 29, 1960. Printed Record pages 69-88 inclusive. [Pages 71-88 are folded pages.]

On May 2, 1960, the Honorable Leon R. Yankwich heard the Petition for Order to Show Cause Why a Writ of Habeas Corpus Should Not Issue and heard the Respondent's Motion to Dismiss. On said date the Court made its Order discharging the Order to Show Cause and dismissed the Petition and respondent was allowed to remain at liberty on his own recognizance until May 14, 1960, at 5 P.M. Printed Record page 89.

The Order Discharging the Order to Show Cause and Judgment of Dismissal was dated May 3, 1960, and filed May 4, 1960, and entered May 5, 1960, and notice thereof mailed to Nathan Newby, Jr., attorney for petitioner, May 5, 1960. Printed Record pages 90-91 inclusive.

On Motion of petitioner execution of sentence stayed and petitioner released on his own recognizance by the United States District Court until final action on appeal, said Order being filed May 6, 1960. Printed Record page 92.

The Order of the United States District Court Discharging the Order to Show Cause and Dismissing the Petition from which the appeal was taken, was based on the alleged failure of the petitioner and appellant to exhaust his State remedies pursuant to Section 2254, Title 28 U. S. C. A. See Motion to Dismiss, Printed Record page 67.

Petitioner contends that he had exhausted all his effective State remedies when he applied for the Writ of Habeas Corpus to the United States District Court, having appealed to the highest State Court available for appeal and having applied for Writs of Habeas Corpus to the State District Court of Appeal and the State Supreme Court, constituting the entire appellate jurisdiction of California, and having been denied a stay of execution sufficient to permit him to apply to the United States Supreme Court for a Writ of Certiorari and there being only two days available within which to stay the execution of the sentence, to wit, April 21 and 22, 1960.

The questions on appeal were raised in the United States District Court by petition of petitiner for Writ of Habeas Corpus and the motion of respondent to Dismiss the Petition and the ruling of the District Court thereon.

No testimony was taken at the hearing, nor any evidence introduced other than the documents on file, as follows:

1. Petition for Writ of Habeas Corpus and Order to Show Cause, Printed Record, pages 3-65.

2. Return to Order to Show Cause, Printed Record, pages 69-88. [Pages 71-88 are folded pages.]

REASONS FOR GRANTING THE WRIT.

1. Judgments Below.

(a) Judgment of Court of Appeals, Ninth Circuit, Upholding Judgment of District Court Dismissing Petition for Writ of Habeas Corpus Filed by Petitioner.

(b) Judgment of District Court Dismissing Petition for Writ of Habeas Corpus Filed by Petitioner in a Collateral Attack on His Conviction by a State Court.

(c) Judgment of Appellate Department of the Superior Court of California in and for the County of Los Angeles Affirming the Judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, Convicting Petitioner of a Misdemeanor.

(d) Judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, Convicting Petitioner of a Violation of Section 2141, California Business and Professions Code, a Misdemeanor for Which He Was Sentenced.

The Court of Appeals rightfully took jurisdiction of the case under the exception set forth in Section 2254, 28 U. S. C., which is as follows:

> "§ 2254. *State custody; remedies in State Courts.*
>
> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967."

The Court of Appeals having rightfully taken jurisdiction and decided the case on its merits, erred in affirming the Judgment of the District Court in dismissing the Petition of petitioner for the issuance of the Writ of Habeas Corpus.

General Nature of Remedy.

The Writ of Habeas Corpus is a safeguard of personal liberty and must be maintained unimpaired and gives a remedy for the enforcement of the civil rights of personal liberty.

> *Ex parte Tom Tong,* 108 U. S. 556, 27 L. Ed. 826;
>
> *Bowen v. Johnston,* 306 U. S. 19, 83 L. Ed. 455.

The writ of habeas corpus is a high prerogative writ, known to the common law as the great object of which is the liberation of those who may be imprisoned without sufficient cause and it is in the nature of a writ of error to examine the legality of the commitment.

> *Ex parte Watkins* (3 Peters 193), 25 U. S. 193, 7 L. Ed. 650.

Also see *Phillips v. Hiatt,* 83 Fed. Supp. 935, wherein the Court ruled:

> "Under section 1651, authorizing federal courts to issue all writs necessary for exercise of juris-

diction, forms of habeas corpus writs are not limited to those recognized in section 2241 or to those recognized in this country when section 1651 in its original form first came into existence, but such provision is a legislatively approved source of procedural instruments designed to achieve the rational ends of the law as new problems arise. 28 U. S. C. A. Secs. 1651, 2241.—Phillips v. Hiatt, 83 F. Supp. 935.

"Writ of habeas corpus is available for use by a District Court within its recognized jurisdiction whenever necessary to prevent an injust and illegal deprivation of human liberty. 28 U. S. C. A. Sec. 1651, 2241.—Id."

When cause is shown for issuance, habeas corpus becomes a writ of right.

Walter v. McKinnis, 221 Fed. 746.

Habeas Corpus is a Civil Remedy.

Habeas Corpus is a civil remedy and must be asserted against the custodian of the petitioner and not the state.

Chessman v. Teets, 239 Fed. 205, 354 U. S. 156, 1 L. Ed. 2d 1253;

Boxedidge v. Lehman, 252 F. 2d 366;

Fed. Rules Civ. Proc., Rules 1, 81a, 28 U. S. C. A.

The purpose of the Writ of Habeas Corpus is to insure that no man may be held in confinement in violation of due process of law and it imposes a strict duty upon all government officials.

28 U. S. C. A. 2255;

United States v. Sobell, 142 Fed. Supp. 515, 244 F. 2d 520.

Habeas Corpus Will Lie Where Other Remedy Does Not Exist

New Federal Judicial Code relating to Habeas Corpus is designed to minimize rigid formality and is the liberal reflection of the Judiciary in permitting those persons who contend they are illegally detained to have their day in court.

United States ex rel. Montgomery v. Ragen, 86 Fed. Supp. 382;

28 U. S. C. A. 2241-2243, 2246-2249.

Prisoner Must Be in Actual Custody.

The Writ of Habeas Corpus will lie only when petitioner is in actual custody.

Hooper v. Hartman, 163 Fed. Supp. 437.

Habeas Corpus is Used to Prevent Miscarriage of Justice.

The Writ of Habeas Corpus is available not only to determine points of jurisdiction, *stricti juris,* and constitutional questions, but to prevent a complete miscarriage of justice.

United States ex rel. Kulick v. Kennedy, 157 F. 2d 811, 332 U. S. 174, 91 L. Ed. 1982.

The constitutional Writ of Habeas Corpus searches through all forms to the sufficiency of the cause of detention.

Broneman v. United States, 138 F. 2d 333.

Prisoner Held Under Excessive Judgment Is Entitled to Writ of Habeas Corpus.

Where sentence is excessive a writ will lie.

Stevens v. McClaughry, 207 Fed. 18.

Writ of Habeas Corpus Will Lie to Protect Constitutional Rights.

Where constitutional rights cannot otherwise adequately be preserved, as where there was no other speedy and efficacious remedy open to petitioner in usual and orderly course of criminal procedure, Habeas Corpus is proper.

In re Williams, 165 Fed. Supp. 879.

Where facts relied on are *dehors* the record and their effect on conviction is not open to consideration and review on appeal, use of Writ of Habeas Corpus in federal courts to test constitutional validity of conviction is not restricted to cases where conviction is void for want of jurisdiction of the trial court, but extends also to cases where conviction has been in disregard to accused's constitutional rights and where writ is the only effective means of preserving those rights.

Waley v. Johnston, 62 S. Ct. 964, 316 U. S. 101, 86 L. Ed. 1302.

Aslo see:

Clarke v. Huff, 119 F. 2d 204, 152 F. 2d 14.

Where by a sentence to imprisonment there is a denial or invasion of a constitutional right, the prisoner may be discharged on Habeas Corpus.

Ex parte Craig, 274 Fed. 177;

Craig v. Hecht, 260 U. S. 714, 67 L. Ed. 477, 263 U. S. 225, 68 Fed. 293.

Though the remedy afforded by habeas corpus is ever ready as a safeguard for human liberties under the Constitution and its exercise is at all times amenable to the processes of justice, it cannot be used to correct errors of law occurring in the trial of a cause over which the court has jurisdiction, unless it affirmatively appears that in the course of the proceedings the court lost jurisdiction because it transgressed constitutional safebguards in the trial of the case.

Bozel v. Hudspeth, 126 F. 2d 585.

It is the contention of the petitioner that the action of the trial court caused it to lose jurisdiction because of the conduct of the court during the trial and in insisting on trying petitioner under Section 2141 of the Business and Professions Code.

Jurisdichion of the trial court may be challenged on a Writ of Habeas Corpus after sentence and execution of the judgment.

Jurisdiction of the trial court may be challenged at any stage of the proceeding, and also may be challenged after conviction and execution of judgment by way of writ of habeas corpus.

United States v. Anderson, 60 Fed. Supp. 649.

The Writ of Habeas Corpus being the proper remedy, a hearing should have been granted by the United States District Court to determine whether or not claims of petitioner as set forth in the petition for the writ were valid. As it was the District Court dismissed the petition on motion of the respondent on the theory that the exception stated in Section 2254 U. S. C. did not apply.

By hearing the motion on the merits the Court of Appeals held that the exception did apply.

Having held that the matter was rightfully in the United States District Court, the Court of Appeals should have ruled that the motion to dismiss should have been denied and the Petition for the Writ heard on the merits, as the only grounds upon which the Petition was challenged was that petitioner did not exhaust his state remedies before applying for the Writ as required by Section 2254 U. S. C.

2. The Original Judgment of the State Trial Court Sentencing Petitioner for an Alleged Violation of Section 2141, California Business and Professions Code Decided a Federal Question Not Heretofore Decided by This Court and Contrary to Decisions of This Court Affecting the Rights, Privileges and Immunities of Petitioner Guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States and the United States District Court in Refusing to Issue the Writ of Habeas Corpus and Dismissing the Petition Decided a Federal Question Not Heretofore Decided by This Court and in a Way Probably Not in Accord With Applicable Decisions of This Court.

The complaint charged that the petitioner practiced a system or mode of healing the sick or afflicted, etc. without having at the time an unrevoked license from the Board of Medical Examiners or the Board of Osteopathic Examiners of the State of California. There is nothing in the complaint to show that petitioner did any act that the holder of an unrevoked license from the Board of Chiropractic Examiners could not law-

fully do, nor is it alleged that petitioner had no such license from the Chiropractic Board.

It is just as necessary in order to ascertain the status of the law and that a criminal offense has been committed in "practicing a system or mode of treating the sick or afflicted" to consider the Chiropractic Act as it is necessary to consider the Medical Practice or Osteopathic Acts.

In other words the Federal question arose when the trial court convicted the petitioner under a law which does not state any crime which could be committed by petitioner.

The license held by petitioner permitted him to do every act denounced as a crime by Section 2141.

Section 2141 does not prohibit the practice of medicine. It prohibits the practice of any healing art. Chiropractors are licensed to practice a healing art.

Historically Section 2141 has always applied to unlicensed persons. That is, persons who have no license to practice a healing art.

People v. Mills, 74 Cal. App. 353.

This Court has held on numerous occasions that a penal statute cannot be given a meaning beyond its express term.

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618;

Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322;

Dirk de Jonge v. State of Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282.

A Statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 58 L. Ed. 1284, 34 S. Ct. Rep. 853;

Collins v. Kentucky, 234 U. S. 634, 638, 58 L. Ed. 1510, 1511, 34 S. Ct. Rep. 924;

Winters v. New York, 333 U. S. 507, 515, 516, 68 S. Ct. 665, 92 L. Ed. 840;

Connolly v. Union Sewer Pipe Co., 184 U. S. 563, 22 S. Ct. 440, 46 L. Ed. 679;

Hackfield v. United States, 197 U. S. 442, 450, 49 L. Ed. 826, 255 S. Ct. Rep. 426.

The California State Court decisions upholding and relying upon the above decisions of this Court are as follows:

Ex parte McNulty, 77 Cal. 164, 167;

Hewitt v. Board of Medical Examiners, 148 Cal. 590;

In re Ewing, 188 Cal. 261, 265;

People v. McCaughan, 49 Cal. 2d 409, 411;

In re Peppers, 189 Cal. 682, 685, 687;

People v. Saad, 105 Cal. App. 2d Supp. 851, 853;

People v. Zimbrolt, 35 Cal. App. 2d Supp. 745, 747.

Tested by the above authorities Section 2141 lacks the specificity which the Court of Appeals finds in

Collins v. Texas, 223 U. S. 288, 56 L. Ed. 439, which does not apply to the case at bar for the reason that in the *Collins* case the Court held that the Statute only required anyone who claimed to practice medicine (defining medicine) or who shall treat or offer to treat any disease, etc., by any system or method, etc., or to effect cures and charge therefor directly or indirectly money or other compensation to receive a verification of authority from the Texas State Medical Board or be guilty of a misdemeanor if he practiced without the authority.

The plaintiff challenged the Statute on the grounds that the definition of practicing medicine was too vague.

With this the Court disagreed.

However, in the *Collins* case the Texas Board of Medical Examiners was the only State authority which could license the practice of the healing arts and anyone who failed to secure a license was guilty of a crime if he violated the clear terms of the law and practiced without a license.

In the case at bar, Section 2141 would be crystal clear if the Medical Board was the only Board with authority to license practitioners of the healing arts.

The adoption of the Initiative Chiropractic Act in 1922 and the failure of the Legislature to amend Section 2141 to include Doctors of Chiropractic in the exempted classes named in Section 2141 rendered it unconstitutionally vague under the rule in the cases cited, *supra.*

As an illustration of what is meant by unconstitutionally vague, the Doctor of Chiropractic believes

that the basic principle of chiropractic is the maintenance of structural and functional integrity of the nervous system by relieving pressure on the nerves by, among other things, manual manipulation of the joints and spinal column.

The Osteopathic Physician and Surgeons practice a form of treatment based on the scientific manipulation of the bones, supplemented by other manual manipulations with the idea of restoring, facilitating, or improving the functions of the body.

When a Doctor of Chiropractic is treating a patient and manipulating his joints and spine if he believes that the health of the patient will be restored by the theory espoused by the Osteopathic Physician and Surgeons who are licensed under the Medical Practic Act and are hence immune to prosecution under Section 2141 of the Act, has he committed the crime of doing an act forbidden by Section 2141? Is he practicing a "little medicine"? Does he violate Section 7 of his license because he practices a mode or system of healing constituting osteopathy forbidden under his license?

The answer is no. In order to practice medicine or osteopathy the Doctor of Chiropractic must hold himself out as a Doctor of Medicine or Osteopathy.

As the proscribed acts denounced in Section 2141 apply to all of the healing arts indiscriminately the Doctor of Chiropractic violates the Act the moment the State Chiropractic Board licenses him to practice and he seeks his first patient.

However the Appellate Department of the Superior Court in and for the County of Los Angeles evolved a neat formula to solve the dilemma of the invalidity and

embarrasment of Section 2141 in the case of *People v. Fowler*, 32 Cal. App. 2d Supp. 737.

The Court said in this case, which has no facts, only 14 pages of legal theory at page 742:

> "The operative effect of the Chiropractic Act is the same as that of an exception or limiting proviso placed in the same act with a prohibition but not made a part of the definition of the offense. It is the rule in such matters that it is not necessary in a criminal charge to negative an exception or proviso which is not a part of the definition or description of the offense. (31 Cor. Jur. 720-725; 14 Cal. Jur. 52, 53; *People v. H. Jevne Co.*, (1919), 179 Cal. 621, 625, 626 [178 Pac. 517]; *Ex parte Hornef* (1908), 154 Cal. 355, 360 [97 Pac. 891]; *People v. Kinsley* (1931), 118 Cal. App. 593, 598 [5 Pac. 2d 938].) Of every complaint which does not negative such a proviso or exception, it is possible to say that all the facts alleged in it may be true and still the defendant may be entirely innocent of crime. But such complaints are, nevertheless, held sufficient by the authorities just referred to and many others which could be cited. The court in *Ex parte Hornef, supra* (1908), 154 Cal. 355, 362, declared the rule as follows: 'At most the proviso is a statement of an exception which in no degree qualifies the offense created by the statute, but simply exempts certain persons from the operation of such statute.'"

The Court in the *Fowler* case says that mere possession of the Chiropractic license is not a complete defense in itself to a charge of violating Section 2141.

At page 742 Par. [1] the Court says:

> "[1] No doubt the possession of a license under the Chiropractic Act by a defendant who is charged with violating the provison of the Medical Practice Act (or Business and Professions Code) here involved affords him a complete defense, so long as he has not exceeded the authority of that license, but it does not follow that the complaint under the Medical Practice Act (or the code) must negative his possession of such a license."

The failure of the *Fozzler* case to hold that mere possession of the Chiropractic license constitutes a complete defense to a charge violating Section 2141 is erroneous and violates the entire theory of negation of the proviso so painstakingly built up by the Court. The exception talked about by the Court in the *Fozzler* case is the exemption of certain classes or persons from prosecution for doing the acts charged as crimes by the language of Section 2141. The requiring of the Doctor of Chiropractic to prove not only possession of an unrevoked license from the Chiropractic Board, but also to prove that he acted within the scope of his license violates due process and the equal protecting of the law and constitutes an arbitrary, discriminatory and unreasonable enforcement of the law and an unconstitutional classification of professions practicing the healing arts. This phase of the subject is contrary to decisions of this Court as will hereafter be shown.

This holding of the *Fozzler* case is contrary to the case of *Dirk de Jonge v. Oregon*, 299 U. S. 353, 362, 81 L. Ed. 278, 282, cited *supra*.

In the *Collins* case the Court did hold that a Federal question was involved and the same is true in the case at bar.

Denial of Equal Protection of Law.

The decisions of the Court of Appeals also violate Section 1 of the 14th Amendment to the United States Constitution in that it denies to the petitioner the equal proection of the law.

It was stated in the case of *In re Lyons, 27* Cal. App. 2d 182, 188, that:

> 1. "The equal protection of the laws is a pledge to the protection of equal laws."

In making the above holding the California court cites *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

Doctors of Chiropractic have the right to the protection of equal laws with the licentiates of the Medical Board and the Osteopathic Board, that is the right to have mere possession of their Chiropractic Licenses as a complete defense to any prosecution for an alleged violation of Section 2141 on an equal footing with licentiates of the other two Boards.

The decision of the Court of Appeals is contrary to decisions of this Court in *Yick Wo v. Hopkins*, 118 U. S. 221, at pp. 227, 228:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal

and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The decision of the Court of Appeals is also contrary to the following decisions of this Court:

Connolly v. Union Sewer Pipe Co., 184 U. S. 563, *supra*.

3. The Court of Appeals in Upholding the Judgment of the United States District Court Fell Into the Same Error and Also Rendered a Decision in Conflict With the Decision of the United States Court of Appeals, Fifth Circuit, January 23, 1959, on the Same Question in the Case of England v. Louisiana State Board of Medical Examiners, 263 F. 2d 661, Denouncing the Right of the State to the Unreasonable and Arbitrary Enforcement of the Law Governing Chiropractors.

The case of *England v. Louisiana State Board of Medical Examiners,* 263 F. 2d 661, held that the Courts have a solemn and unescapable duty, in an appropriate case, of deciding whether State action is so arbitrary and unreasonable as to be unconstitutional. On page 665 the Court said:

> "The answer is that the mere form of the statutes of a state cannot justify or excuse the deprivation of one's rights under the Constitution of the United States. The 'practice of medicine' is defined broadly enough to apply to dentists, nurses, and pharmacists. Each of those three professions is protected by a special statute, but if it were not, would any one deny the jurisdiction of a federal district court to protect a dentist, a nurse, or a pharmacist in the practice of his or her useful profession or calling?"

The Court of Appeals cannot deprive the petitioner of his right to the same criminal procedure when he is arrested and tried for practicing outside the scope of his license as is granted a licentiate of the Medical Board when arrested and charged with practicing in violation of his license.

The State's administration of the Medical Practice Act, especially Section 2141, in an arbitrary, unreasonable, and discriminating manner in the case of petitioner at all levels of the case created an actual discrimination and a denial of petitioner's constitutional rights protected by the Fourteenth Amendment, and a denial of the civil rights of petitioner, contrary to the rule stated in *Rogers v. Alabama*, 192 U. S. 213, 226 (24 S. Ct. 258, 48 L. Ed. 417, 419) and the following cases:

Truax v. Corrigan, 257 U. S. 312, 331 (42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375).

Also see:

Glicha v. Michigan Liquor Control Comm., 160 F. 2d 96, 99;

East Coast Lumber Terminal v. Town of Babylon, 174 F. 2d 106, 112.

Also see State cases following Rule of this Court.

People v. Harris, 182 Cal. 2d Supp. 837, and cases cited therein;

People v. Amdua, 123 Cal. App. 2d Supp. 951, 968.

4. The Decision of the Court of Appeals Has Decided an Important Question of State Law Contrary to State Decisions and Contrary to the State Constitution, Article I, Sections 11 and 13 of the California Constitution and Contrary to the Initiative Chiropractic Act of California.

The Court of Appeals in holding that the petitioner "practiced a little medicine" and that the Statutory and Court classification of the professions were not unreasonable, that the Statute had sufficient specificity and

that there was no lack of due process is contrary to the California State law—the State Court decision and the State Constitution for the following reasons:

People v. Mills, 74 Cal. App. 353, holds that Section 2141 applies soley to unlicensed persons.

People v. LaBarre, 193 Cal. 388, 394, holds that the Chiropractic Act and the Medical Practice Act are to be construed as one statute as a unitary system of of health laws.

Denial of Equal Protection of the Law.

Cooper v. the State Board of Medical Examiners, 35 Cal. 2d 242, holds that a drugless practitioner who is licensed by the Medical Board cannot be charged with a violation of Section 2141 for practicing outside the scope of his license because he is licensed by the Medical Board and thus comes under the exemption.

Respondent claims that if the Doctor of Chiropractic does an act the same as the drugless practitioner he can be charged with a violation of 2141 because he does not hold a license from the Medical Board.

This is a denial of equal protection of the laws and is an unreasonable classification.

By virtue of the above classification, 2141 becomes void and unconstitutional under the rule enunciated in *Ex parte Sohncke*, 148 Cal. 262, at 267 as follows:

> "Upon this subject the supreme court of the United States has said that the state, 'in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class

engaged in the same domestic trade, to do the same things with impunity,' and that it cannot discriminate 'by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.' (Connolly v. Union Sewer Pipe Co., 184 U. S. 563 (22 Sup. Ct. 440).)"

In the case at bar appellee would divide up the licentiates of the healing art into two classes and make criminals of one class for violating their licenses (Doctors of Chiropractic) while exempting the other classes from criminal prosecution for violating their licenses (Physicians and Surgeons, Drugless Practitioners, Chiropodists and Midwives).

Lack of Due Process.

There is a complete lack of due process in the prosecution of Doctors of Chiropractic under Section 2141. Respondents claim that petitioner had due process because he had a chance to prove that he acted within his license. This is not so as will be shown later in this argument. However, this attitude is false and cynical as it denies petitioner the ordinary accepted defenses accorded anyone charged with a crime.

While the rule in the case of *Ex parte Solomke*, 148 Cal. 262, is a complete answer to the claim that there was no lack of due process in the California proceed-

ings, petitioner respectfully calls the Court's attention to the fact that the interpretation placed on Section 2141 by the trial court placed an unconscionable burden on the petitioner.

The rule is that a pleading charging a statutory offense is required to negative provisos which are descriptive of the offense but it is ordinarily not incumbent on the prosecution to prove that the defendant does not fall within the exception as that is a matter of defense and ordinarily to prove that he falls within the exception does not place an undue burden on the defendant. However, if the defendant is required to prove a series of acts or to interpret the meaning of a series of acts, the burden becomes unconscionable and the Statute is void.

In *People v. Tilkin*, 34 Cal. App. 2d Supp. 743, at p. 750, the court sets out in detail the reasons why the exception to the Los Angeles picketing ordinance placed an unconscionable burden on the defendant to prove his innocence. The court said:

> "All that the People would have to allege would be an act set forth in one or the other of those sections: either that the accused walked to and fro (an act defined in section 1 of the ordinance as picketing) on a public street in a manner calculated to influence a person not to enter a place of business or that he carried a banner on a public street in that manner, and that is all they would have to prove."

The court then pointed out that the defendant to escape conviction would have to prove:

> 1. That a bona fide strike was in progress at the place he was picketing;

2. To prove that a bona fide strike was in progress, the defendant would have to then prove:

(a) The number of employees employed continually 30 days before the strike;

(b) That a majority of the employees by secret ballot had voted to strike;

(c) That a majority had actually quit work;

(d) That they had quit work to affect their wages;

3. He would also have to prove that he had been designated in writing by a majority of the striking workers to picket.

Now let us apply this test to a Doctor of Chiropractic charged with a violation of Section 2141. What would he have to prove to escape conviction after the prosecution makes a *prima facie* case by proving that he did any of the acts denounced in 2141?

The defendant to escape conviction would have to prove the following:

1. That he had an unrevoked license from the Chiropractic Board. (This is no burden.)

2. That he acted within the scope of his license.

This would be an unconscionable burden because he would have to prove the following:

(a) That he made a diagnosis of the patient. This might involve blood tests, X-rays, urine and fecal analysis, palpatation and questions directed to the patient.

(b) That the measures taken were Chiropractic as taught in Chiropractic Schools and Colleges. *Evans v. McGranaghan*, 4 Cal. App. 2d 202, and

In re Hartman, 10 Cal. App. 2d 213, where it is said at pages 217 and 218:

> "It cannot be told, aside from the evidence, whether the method of treatment here in question is or is not a part of the practice of chiropractic. What constitutes chiropractic and what is included in such a practice is not defined in this act and could only be determined by the taking of evidence. As the court said in Evans v. McGranaghan, 4 Cal. App. (2d) 202 (41 Pac. (2d) 937); 'The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. But the court has no way to determine the scope of chiropractic as taught in such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper.' "

To prove what is taught in chiropractic schools and colleges would be a terrific burden, especially if the defendant had to prove what was taught in 1922 in chiropractic schools and colleges.

(c) That the necessary mechanical, hygienic and sanitary measures incident to the care of the body used by the defendant were within the scope of his license and did not constitute the practice of medicine surgery, osteopathy, dentistry, or optometry.

(d) The defendant would also have to prove the meaning of the term "practice of medicine or surgery." Does it mean holding oneself out as a M.D. or D.O. or does the use of any method used in medicine or surgery as ancillary to Chiropractic constitute the practice of medicine or surgery?

(d) What is *materia medica?* Does the use by the defendant of drugs and medicines found *in materia medica* violate his license if they were used in diagnosis or use as auxiliary to Chiropractic or were covered by Sections 4052 and 4057 Cal. Business and Profession Code?

The *Fowler* case, 32 Cal. App. 2d Supp. 737, 751, holds that use of drugs and medicines by a Doctor of Chiropractic is only a crime if used to cure disease.

The *Fowler* case in holding that the complaint does not have to negative the proviso overlooks the fact that there is no proviso in 2141 except the proviso dreamed up by the Appellate Division of the Superior Court that holders of unrevoked certificates from the Chiropractic Board have a complete defense to 2141 if they hold a license from the Chiropractic Board and act within the scope of their licenses. This is pure judicial legislation and void. *This is lack of due process.*

The *Fowler* case which is the basis of the Peoples' case as the case of *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, is based on the *Fowler* case, states that the term "Chiropractic" was well known in 1922 but there is no evidence introduced or referred to in the *Fowler* case as to what the public thought Chiropractic meant. Yet this is the foundation of the *Fowler* case. Judge Shaw in the *Fowler* case states that the dictionary definition of Chiropractic is what the public believed it to be. This is purely judicial speculation.

The Doctors of Chiropractic have never been treated fairly in California since the *Fowler* case was decided October 20, 1938.

Although the cases of *Evans v. McGranaghan*, 4 Cal. App. 2d 203, and *In re Hartman*, 10 Cal. App. 2d

213, 217, state the rule that extrinsic evidence must be resorted to to determine what constitutes the practice of Chiropractic, this was denied the Petitioner in the trial court.

Is this fair? Is this due process?

Is it due process to require the Doctor of Chiropractic to prove his innocence and not to require the prosecution to prove his guilt?

Sections 11 and 13 of Article I of the California State Constitution are interpreted by the State courts as being the same as the rights, privileges and immunities guaranteed by the Fourteenth Amendment.

Manford v. Singh, 40 Cal. App. 700.

5. The Decision of the Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court, Especially Thompson v. Louisville, 262 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 654.

The decision of the Court of Appeals is contrary to the principles enunciated in the above-cited case.

The ultimate question in the *Louisville* case was whether or not the conviction of Thompson rested on any evidence at all.

Of course, evidence was introduced at the trial of *Thompson* just as it was introduced at the trial of petitioner.

The basic evidence against petitioner was that he made a hypodermic injection into the tissue of the patient and gave a vaccination which the court held as a matter of law was the practice of medicine.

Section 2141 does not charge as a crime the practice of medicine, only certain acts below set forth to any person who:

1. Practices or attempts to practice, advises, or holds himself out as practicing a mode or system of treating the sick;

2. Diagnoses;

3. Treats;

4. Operates for;

5. Prescribes for,

Any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition.

Giving a hypodermic injection or vaccination is a necessary mechanical hygienic, and sanitary measure incident to the care of the body in the prevention of disease permitted under Petitioners License and cannot come within the definition of any of the proscribed acts of Section 2141.

For this reason no evidence was introduced by the Prosecution at the trial of petitioner to support the charge that he violated Section 2141, and the words of Honorable Justice Hugo Black in the case of *Thompson v. Louisville*, at 362 U. S. 200, 4 L. Ed. 2d 624, 650, should be the rule in this case:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

6. The Conduct of the Trial Court in Instructing the Jury Denied the Petitioner a Fair and Impartial Trial.

The Jury Insturctions complained of are found in the Printed Record at pages 62 to 64.

In view of the fact that the court instructed the jury that if the petitioner gave either a vaccination or a hypodermic injection for the treatment of an ailment or physical condition and denied to the petitioner the right to introduce evidence as to why the vaccinations were given or why the hypodermic injections were given, such instructions amounted to a directed verdict.

When the Jurors attempting to function as a fact-finding body, requested instructions on the meaning of the license held by petitioner the court cut them off and stated that the meaning of the license had no part in the case and was immaterial.

The court was determined to convict the petitioner at all costs.

Printed Record 62-64.

Neither vaccination nor giving a hypodermic injection are denounced by Section 2141.

Even if said acts charged to petitioner had been denounced by Section 2141, mere possession of an unrevoked license from the Chiropractic Board would be a complete defense.

7. As Far as Petitioner Knows the Questions Herein Raised Have Never Before Been Presented to This Court on the Merits, and the Decision of This Court Will Determine the Future Course of the Practice of Chiropractic in California and the Pattern of Enforcement of the Medical Practice Act and the Chiropractic Act.

There are no opinions or decisions reported of any action by this Court on the questions raised in this petition.

The State courts are divided on the question and the Doctors of Chiropractic are unable to safely practice their profession.

The case of *Oosterveen v. Board of Medical Examiners*, 112 Cal. App. 2d 201, 203 (1952) states that there were approximately 5,000 Chiropractors in the State of California.

All of these Doctors of Chiropractic are vitally affected by the decision of his Court.

If this Court fails to hold that a Doctor of Chiropractic cannot be prosecuted for a violation of Section 2141 Business and Professions Code, all Doctors of Chiropractic in California will be subject to persecution by the Medical Board without defense or redress.

To destroy the Doctor of Chiropractic mere arrest is sufficient as the stigma of arrest destroys the confidence of the community in the competence of the doctor.

If the prosecution had to arrest and try Doctors of Chiropractic under Section 15 of the Chiropractic Act or Section 2426 of the Business and Professions Code

(Medical Practice Act) they would have to introduce evidence to prove the doctor guilty of practicing in violation of his license and could not rely on the *prima facie* case of guilty handed them on a silver platter under Section 2141.

8. The Trial, Conviction and Sentencing of Petitioner, a Doctor of Chiropractic, for an Alleged Violation of Section 2141, California Business and Professions Code, and the Affirmance of the Sentence by the Highest State Appellate Court: the Refusal of the United States District Court to Issue the Writ of Habeas Corpus and the United States Court of Appeals in Affirming Such Decision Deprives Petitioner of Any Forum in Which to Defend His Constitutional Rights Except This Court of Last Resort.

The Supreme Court of the United States has always been the bulwark of liberty and is the last chance of petitioner to be freed of persecution for an alleged violation of Section 2141 which does not apply to him.

Conclusion.

The question is not that the "Appellant practiced a little medicine" but whether or not a penal statute enacted in 1913 to apply solely to unlicensed practioners of the healing arts can, by judicial legislation under the guise of interpretation 25 years later, be applied to a licentiate of the healing arts when the intent of the Legislature, which originally enacted the law, was to apply the law solely to unlicensed persons?

And further why should not the mere possession of a license from the Chiropractic Board be a complete

defense to any prosecution under the statute the same as licentiates of the Medical Board?

Substitute the phrase "healing arts" for "domestic trade" in the case of *Ex parte Solucke*, 148 Cal. 262, 267, and you have the answer to the above question that Section 2141 does not apply to Petitioner and that to deny to Petitioner the right to have *mere possession* of his license as a complete defense to prosecution under Section 2141 is unreasonable and an unconstitutional classification.

For the reasons above stated petitioner respectfully submits that a *per curiam* adverse decision is not indicated in this violation of the petitioner's constitutional rights and that his application for a Writ of Certiorari should be granted.

Respectfully submitted.

NATHAN NEWBY, JR.,
Attorney for Petitioner.

Of Counsel:
A. L. WIRIN.

APPENDIX A.

Opinion and Judgment of Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Marvin Dayan, aka Marvin Dayon, Appellant, vs. People of the State of California, Appellee. No. 17,020. July 24, 1961.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

Per Curiam:

By habeas corpus, appellant Dayan, a chiropractor, makes a collateral attack on his state conviction for a violation of Section 2141 of the California Business and Professions Code. In sum, the charge was he practiced a little medicine.

We find his constitutional claims without merit. California can define the limits of its professions, and we find nothing unreasonable in the statutory classifications or the California interpretations thereof. The statute has sufficient specificity. See Collins v. Texas, 233 U. S. 288. And we find no lack of due process in the California proceedings.

All chiropractors apparently are fairly treated in California under their classification. But Dayan did not stay within it. While one comes from reading the record with some sympathy, we can find no law to help appellant.

The judgment of dismissal is affirmed.

(Endorsed) Per Curiam Opinion Filed July 24, 1961.

Frank H. Schmid, Clerk.

Judgment of United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Marvin Dayan, aka Marvin Dayon, Appellant, vs. People of the State of California, Appellee. No. 17020.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered July 24, 1961. Frank H. Schmid, Clerk.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, August 19, 1961.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition for appellant, filed August 22, 1961 and within time allowed therefor by rule of court, fo ra rehearing of above cause be, and hereby is, denied.

APPENDIX B.

Order of Court of Appeals Denying Rehearing.

Office of the Clerk, U. S. Court of Appeals, P. O. Box 547, San Francisco 1, Calif.

August 29, 1961

Nathan Newby, Jr., Esq.,
Attorney at Law,
517 H. W. Hellman Bldg.,
Los Angeles, California.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 17020—Dayan v. People of the State of Calif., was this day denied.

Pursuant to Rule 23, and unless stayed by the Order of the Court, a mandate of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Very truly yours,

Frank H. Schmid, Clerk

Order of Court of Appeals Staying Mandate.

In the United States Court of Appeals, for the Ninth Circuit.

Marvin Dayan, aka Marvin Dayon, Appellant, vs. People of the State of California, Appellee, No. 17020.

Order Staying Mandate Under Rule 26, Rules of U. S. Court of Appeals, Ninth Circuit.

Upon reading and filing of the verified Petition of Marvin Dayan whereby it appears that unless stayed by this court a mandate will be issued by this court

effective on Tuesday, September 5, 1961; and it appearing that Marvin Dayan was released on a wirt of habeas corpus from imprisonment of his own recognizance and is now at liberty on his own recognizance and will be again imprisoned unless the order of mandate about to issue is stayed pending the filing of a petition for writ of certiorari to the Supreme Court of the United States to review the order of this court denying the Petition for Rehearing and the decision of this court heretofore filed in the above matter;

NOW, THEREFORE, IT IS HEREBY ORDERED that the issuance of a mandate in the above matter be stayed pending the final judgment in the matter by the Supreme Court of the United States, or pending final judgment by this court, if the petitioner should fail to file in the Supreme Court of the United States his petition for writ of certiorari by October 1, 1961 as provided by law, with the Clerk of the Supreme Court of the United States by October 1, 1961.

Dated: Aug. 21, 1961.

STANLEY N. BARNES,

Justice of the Circuit Court of Appeals Ninth Circuit.

(Copy)

APPENDIX C.

Text of Cases Cited by State Appellate Court in Its Opinion and Not Reported.

Text of Case of People v. Mansfield, CR A 1749, Superior Court of the State of California, Appellate Department.

In the Appellate Department of the Superior Court County of Los Angeles, State of California. ———

People of the State of California, Plaintiff and Appellant, vs. J. B. Mansfield, Defendant and Respondent.

MEMORANDUM OPINION

Appeal by defendant from an order of dismissal made by the Justice's Court of San Gabriel Township, C. E. Christopher, Judge. Order reversed.

The statement on appeal and the complementary minutes of the trial court show that upon the filing of the amended complaint the defendant was arraigned and thereupon made the suggestion that the court, of its own motion, dismiss the action. So far as appears —and the minutes go into details—there was no plea entered, no waiver of a jury trial, no jury impanelled, and it affirmatively appears that the stipulation was "for the purpose of hearing the motion." We conclude that the trial of the case had not been entered upon, the defendant had not been put in jeopardy; and the people's appeal is authorized.

The fundamental error in the reasons given for the order of dismissal appears in the recital, in the order itself, "that the things charged as against this defendant are the things prohibited under the said Chiropractic Act, a penalty being provided therein for any violation thereof. . . ." Nowhere in the Chiropractic

Act (Act 4811, Deering's Gen'l. Laws 1937) is it declared to be unlawful to do any of the acts charged against the defendant. One finds the commission of those acts declared to be a misdemeanor in section 2141 of the Business and Professions Code or nowhere.

The fault of the argument supporting the order lies in the interpretation placed upon section 7 of the Chiropractic Act, which, after stating that a license to practice chiropractic authorizes certain acts, continues: "but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry . . ." The language does not permit of the interpretation that its provisions make it unlawful for the holder of a chiropractor's license to practice optometry, for example. If sections 3000-3152 of the Business and Professions Code were repealed, so that generally there was no restriction on the practice of optometry, could it be seriously argued that section 7 of the Chiropractic Act made it a public offense for holders of chiropractic licenses to practice optometry? All that the concluding words of section 7 purport to do is make it clear that the authority of the license referred to in the section does not authorize the licentiate to engage in the named practices, which are prohibited by other statutes.

Section 1000 of the Business and Professions Code serves no function other than to "complete the record." It makes no attempt to enlarge the scope of the Chiropractic Act. If it were given the effect which is attempted to be accorded it, it would follow that one licensed to practice chiropractic would be governed only by the Chiropractic Act respecting the practice of dentistry and of veterinary medicine. Such an interpretation is obviously untenable.

The contention that chiropractors are denied the equal protection of the law, if the present complaint is held good, is in essence an attack upon the principle that an exception need not be negatived in a complaint. But, as pointed out in People v. Fowler (1938) 32 Cal. App. 2d 737, 84 P. 2d 326, and again in People v. Tilkin (1939), 34 Cal. App. 2d 743, 90 P. 2d 148, 151, this principle is one of universal recognition; this court may not deny it. The only question open for consideration by us is whether or not the principle so thoroughly established was properly applied in People v. Fowler. Further consideration of this question has not caused us to change our opinion. We hold that the complaint before us states a public offense and that it was error to dismiss the complaint. The order of dismissal is reversed.

Bishop
Judge

Dated December 13, 1940.

I concur in the foregoing opinion, but desire to add to it my conclusion that, aside from the effect of respondent's claim of discrimination upon the rule against negativing exceptions in a criminal pleading, that claim lacks substance. In effect, the discrimination to which he points is that, under the statute as construed by us, one holding a chiropractor's license may be charged with doing an act which is authorized by that license, without mentioning such license in the complaint, and thus compelled to make his defense by producing his license, whereas one holding a license under the medical practice act or the osteopathic act cannot be put in that predicament because of the necessity of negativing his

possession of such license in the complaint. This claim assumes that an unfounded charge will be brought against a chiropractor, but not against holders of the other licenses mentioned. This is not the proper basis for considering the question of discrimination. We must assume the same situation in each case, that is, that an unfounded charge is made. Thereupon, in each case, regardless of the form of the complaint, the defendant will be put to the necessity of making his defense and presenting his license, for the allegations of want of licenses, being negative allegations of matters peculiarly within the knowledge of the defendant, need not be proved by the prosecution. People v. McClain (1934), 2 Cal. App. 2d (Supp.) 751, 758, and cases there cited. The only real difference between the two cases, then, is that one making an unfounded charge against the holder of a medical or osteopathic license must swear to an untrue statement and thus possibly (but not necessarily) commit perjury, whereas an unfounded charge against a licensed chiropractor may be made without the maker so involving himself. A statutory discrimination which depends for its existence on the assumption that an unwarranted criminal charge will be made and prosecuted and operates only to facilitate somewhat the doing so against one class of persons as compared with others, seems to me too unsubstantial to support a holding that any defendant is deprived of the equal protection of the laws.

Shaw
Presiding Judge,

I agree with my Associates generally in their conclusions excepting insofar as they hold that the complaint states a public offense. Because I believe it

fails to state any public offense I dissent from the order made.

The complaint charges the defendant with practicing "a system or mode of treating the sick or afflicted . . . without having at the time of so doing a valid, unrevoked certificate from the Board of Medical Examiners of the State of California, or a valid, unrevoked certificate from the Board of Osteopathic Examiners of the State of California." There is nothing in the complaint to show that the defendant did any act which the holder of a valid, unrevoked certificate from the Board of Chiropractic Examiners could not lawfully do, nor is it alleged that he had no such certificate.

In order to ascertain the status of the law and that a criminal offense has been committed in "practicing a system or mode of treating the sick or afflicted" it is just as necessary to consider the Chiropractic Act as it is the Medical Practice or Osteopathic Acts. As it was essential in People v. Tilkin (1939), 34 Cal. App. 2d 743 to consider the several sections of the City Picketing Ordinance in order to ascertain the status of the law and that an offense had been committed, so it is necessary here.

Consistency should not be regarded as merely a jewel for courts to admire but as a necessity of life for justice to conserve.

Since the complaint does not state a public offense the order should be affirmed.

Schauer
Judge,

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Dated: May 24, 1960

Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By: H. B. Craig
Deputy

APPENDIX D.

Text of Statutes Involved Not Set Out in Body of Petition.

28 U. S. C. Section 1254 (1):

"§1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U. S. C. Section 1291:

"§1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

28 U. S. C. Section 1651 (a):

"§1651. *Writs*

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U. S. C. Section 2241 (a)(c)(3):

"§2241. *Power to grant writ*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the dis-

trict courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

* * *"

Section 4 of the Chiropractic Act, Initiative Measure, Stats. 1923, p. xxi, Sec. 4 (Section 1000-4, West's Annotated California Codes):

"§1000-4. *Powers of board.*

The board shall have power:

(a) To adopt a seal which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the Secretary of State for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed.

(f) To determine minimum requirements for teachers in chiropractic schools and colleges.

(g) To approve chiropractic schools and colleges whose graduates may apply for licenses in this State. Any school meeting the requirements of Section 5 of this act and the rules and regulations adopted by the board shall be eligible for such approval.

(h) The board may employ such investigators, clerical assistants, and other employees as it may deem necessary to carry into effect the provisions of this act, and shall prescribe the duties of such employees." (As amended stats. 1947, c. 151, p. 677, §2, adopted Nov. 2, 1948).

Section 5 of the Chiropractic Act, Initiative Measure, Stats. 1923, p. xxi, Section 5 (Section 1000-5, West's Annotated California Codes):

"§1000-5. License to practice, application, fee, certificate, educational requirements. LICENSE TO PRACTICE: FEE: EDUCATIONAL REQUIREMENTS. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars ($25.) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic school or college which teaches a course of not less than 4,000 hours,

extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or of proof, satisfactory to the board, of education equivalent in training power to a high school course.

The schedule of minimum education requirements to enable any person to practice chiropractic in this State is as follows, except as herein otherwise provided:

Group 1		
Anatomy, including embryology and histology	18 to	20%
Group 2		
Physiology	6 to	8%
Group 3		
Biochemistry, inorganic and organic chemistry	6 to	8%
Group 4		
Pathology and bacteriology	10 to	12%
Group 5		
Public Health, hygiene and sanitation	3 to	4%
Group 6		
Diagnosis, pediatrics, dermatology, syphilology and psychiatry	12 to	18%
Group 7		
Obstetrics and gynecology	3 to	4%
Group 8		
Principles and practice of chiropractic, physiotherapy and office procedure	25 to	28%
Total	83 to	100%
Electives	17 to	0%

Section (c) of Section 6 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxii, Sec. 6 (Section 1000-6(c)), West's California Annotated Codes):

> "§1000-6. Board of examiners, meetings, offices, examinations.
>
> (c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools or colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in section five hereof. A license shall be granted to any applicant who shall make a general average of seventy-five per cent, and not fall below sixty per cent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further cost, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation the applicant shall be given a credit of one per cent on the general average."

Section 13 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxiv, Sec. 13 (Section 1000-13, West's Annotated California Codes):

> "§ 1000-13. Health regulations, death certificates, reports. Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper

authorities, and such reports shall be accepted by the officers of the departments to which the same are made."

Section 5 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxiv. Sec. 15 (Section 1000-15 West's Annotated California Codes):

"Section 1000-15. *Noncompliance with and violations of act.* Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title 'chiropractor' or 'D.C.' or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor' or 'D.C.' immediately following his name, or the use of the letters 'M.D.' or the words 'doctor of medicine,' or the term 'surgeon' or the term 'physician,' or the word 'osteopath,' or the letters 'D.O.' or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both. (Initiative Measure, Stats. 1923, p. xxiv, § 15.)"

Section 17 of the Chiropractic Act (Initiative Measure, Stats. 1923, p. xxv, Sec. 17) (Section 1000-17, West's Annotated California Codes):

> "§ 1000-17. Prosecution of violators, enforcement of act. It shall be the duty of the several district attorneys of this state to prosecute all persons charged with the violation of any of the provisions of this act. It shall be the duty of the secretary of the board, under the direction of the board, to aid attorneys in the enforcement of this act."

Section 1001 of Business and Professions Code (Added. Stats. 1945, c. 623, p. 1105, Sec. 1, as amended 1951, c. 420, p. 1404, Sec. 1 (Section 1001, West's Annotated California Codes):

> "§ 1001. Directory. In each year, the State Board of Chiropractic Examiners shall compile any may thereafter publish and sell a complete directory of all persons within the State who hold unforfeited and unrevoked certificates to practice chiropractic, and whose certificate in any manner authorizes the treatment of human beings for diseases, injuries, deformities, or any other physical or mental conditions."

The directory shall contain:

(a) The following information concerning each such person:

1. The name and address of such person.

2. The names and symbols indicating his title.

3. The school, attendance at which qualified him for examination or admission to practice.

4. The date of issuance of his certificate.

(b) The annual report of the board for the prior year.

(c) Information relating to other laws of this State and the United States which the board determines to be of interest to persons licensed to practice chiropractic.

(d) Copies of opinions of the Attorney General relating to the practice of chiropractic.

(e) Copy of the provisions of this chapter and copy of the act cited in Section 1000.

"The board may require the persons designated in this section to furnish such information as it may deem necessary to enable it to compile the directory. Every person so designated shall report immediately each and every change of residence, giving both his old and new address.

The directory shall be evidence of the right of the persons named in it to practice unless his certificate to practice chiropractic has been cancelled, suspended, or revoked. The board may collect from each person who voluntarily subscribes to or purchases a copy of the directory the cost of publication and distribution thereof; except that one copy of the directory shall be distributed without charge to each certificate holder of the board."

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JAMES R. BROWNING, CLERK

In The

Supreme Court of the United States

October Term, 1961

No. 446

Marvin Dayan, known as Marvin Dayon,

Petitioner,

vs.

The People of the State of California,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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In The

Supreme Court of the United States

October Term, 1961

No. 446

Marvin Dayan, known as Marvin Dayon,

Petitioner,

vs.

The People of the State of California,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

I.

Statement.

Petitioner was arraigned in the Municipal Court of Los Angeles Judicial District on a four count complaint charging three violations of Section 2141 of the Business and Professions Code of the State of California and one violation of Section 4143 of the same code [R. 77]. On November 2, 1959, a jury returned a verdict of guilty of the three counts of violating Section 2141 of the Business and Professions Code.

Appellant's conviction was affirmed by the Appellate Department of the Superior Court of the State of California on March 2, 1960 [R. 40, 41], and a Petition

for Rehearing was denied on March 14, 1960 [R. 42, 43].

Petitions for Writs of Habeas Corpus urging the same constitutional issues as are being raised in the instant case were filed in the District Court of Appeal of the State of California [R. 23], and in the Supreme Court of the State of California [R. 15] and both were denied.

Petitioner's petition for Habeas Corpus was then filed in the United States District Court, Southern District of California, and was dismissed by that court on April 29, 1960 [R. 68].

Petitioner subsequently sought two separate Writs of Certiorari in the United States Supreme Court, one to review the judgment of the Appellate Department of the Superior Court of California and the other the California Supreme Court's denial of a Writ of Habeas Corpus. Both such writs urged the same constitutional issues that comprise the instant petition and on October 10, 1960, both writs were denied. (No. 142, *Marvin Dayon v. California,* 5 L. Ed. 2d 48; No. 194, *Marvin Dayon v. California,* 5 L. Ed. 2d 51.)

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment of dismissal July 24, 1961, and denied a rehearing (Petition, App. A). The petitioner now, for the third time, seeks a Writ of Certiorari in this Court.

II.

A Chiropractor May Be Validly Prosecuted Under Section 2141 of the Business and Professions Code of California.

1. The Pertinent Provisions and Statutes of California Law.

Section 2141 of the Business and Professions Code provides that:

> "Any person who practices or attempts to practice or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

The certificates provided in Chapter 5 to which Section 2141 refers, do not include those issued to chiropractors. The chiropractors are granted licenses under Division 2 of Chapter 2 of the Business and Professions Code.

The privilege of practicing the chiropractic arts in California emanates from an initiative, known as the Chiropractic Act, which was passed by California in 1922 (now codified—Sections 1000-1001, Division 2, Chapter 2, Business and Professions Code of the State of California).

The substantial language of Section 2141, under which the petitioner was prosecuted, is found under the Medical Practices Act as amended in 1917 (Stats.

1917, Ch. 81, p. 114—[Appendix A]) which preceded the Chiropractic initiative.

When called upon to interpret the effect of the Chiropractic Act upon this certain provision, Section 2141 of the Business and Professions Code (originally of the Medical Practices Act), the highest state court to hear such matters, the Appellate Department of the Superior Court, gave it the following construction:

> "The lack of such license is not stated by the last-mentioned act (or the code) as a part of the definition of the offense there denounced. The question of such a license enters into the case only by reason of the separate Chiropractic Act. No part of the language of the Medical Practice Act was expressly repealed, or removed or deleted from that act by the Chiropractic Act. . . . The operative effect of the Chiropractic Act is the same as that of an exception or limiting proviso placed in the same act with a prohibition but not made a part of the definition or description of the offense. . . ."
>
> *People v. Fowler*, 32 Cal. App. 2d Supp. 737, 742, 84 P. 2d 326.

As a matter of statutory construction the chiropractic license was held not to be a "license" under Section 2141. Furthermore, it was found that Section 2141 was not repealed by the Chiropractic Act.

The court recognized that the chiropractic license was a valid defense to Section 2141 for all acts properly authorized under the Chiropractic Act. For *ultra vires* acts, however, a chiropractor was answerable under Section 2141. (*People v. Fowler, supra; People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, 938, 218 P. 2d 1025.)

The court determined what then was *ultra vires.* It found that chiropractic, as it was defined in 1922 and as taught in 1922, set the boundaries. (*People v. Fowler, supra; People v. Mangiagli, supra,* construing Secs. 1000-1007, Business and Professions Code of the State of California.)

Pertinent to the case at bar, it was found in the *Mangiagli* case, *supra,* that injections were a part of *materia medica* and that it was unlawful for a chiropractor to dispense them under Section 7, Chiropractic Act (Secs. 1000-1007, Business and Professions Code);[1] that they were simply beyond the authorized scope of this healing art, and that a chiropractor could be convicted therefor under Section 2141. (See also, *People v. Augusto,* 193 A. C. A. 254, 249.)

The District Court of Appeal, Second Appellate District, State of California, approved in a minute order the rule of law established by the *Fowler* and *Mangiagli cases.* (Crim. 6798, *In re Dayon on Habeas Corpus,* 172 A. C. A. No. 2, p. 5, of the Minutes (Appendix B).)

2. The State Court's Construction of State Statutes Is Binding Upon the Federal Courts.

(a) *It is a Basic Constitutional Principle That the Construction of a State's Statutes by Its Court of Last Resort Must Be Accepted by the Federal Courts.*

Williams v. Oklahoma, 358 U. S. 576, 3 L. Ed. 2d 516;

---

[1]Inasmuch as injections are beyond the scope of a chiropractor's license, the trial court in *People v. Dayon,* No. 98050, held properly that evidence of the substance injected into the complaining witnesses was immaterial.

Farncourt v. Denver, 252 U. S. 7, 64 L. Ed 424;
Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460;
Albertson v. Millard, 345 U. S. 242, 97 L. Ed. 984.

The decision of the highest court of a state as to whether a statute has repealed the provisions of a former act is conclusive upon the federal courts.

Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97;
Kibbe v. Kibbe, 93 U. S. 674, 23 L. Ed. 1005;
Ughbanks v. Armstrong, 208 U. S. 481, 52 L. Ed. 582.

Whether one state statute excludes another, or both are to be construed together, is a matter of state law on which the decision of the state court is controlling on the federal courts.

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270.

(b) *It Is the Province of the Courts of a Particular State to Determine What Its Laws Are, and to Determine Whether Particular Acts on the Part of an Alleged Offender Constitute a Crime Under Such Laws.*

Appleyard v. Massachusetts, 203 U. S. 222, 51 L. Ed. 161;
Howard v. Fleming, 191 U. S. 126, 48 L. Ed. 121;
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 92 L. Ed. 455;
International Union etc. v. O'Brien, 339 U. S. 454, 94 L. Ed. 978.

III.

Section 2141, Business and Professions Code, Is Sufficiently Definite and Certain, and Therefore Is Not Repugnant to the Substantive Guarantees of the Due Process Clause of the Fourteenth Amendment.

In determining whether a statute is invalid on the ground of vagueness, the applicable standard is not one of wholly consistent academic definition of abstract terms; it is rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.

> *American Communications Assn. v. Douds*, 339 U. S. 382, 94 L. Ed. 925.

The plain words of a statute must be given the meaning naturally attributable to them.

> *United States v. Resnick*, 299 U. S. 207, 81 L. Ed. 127.

Furthermore, the rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, and in frustration of the obvious legislative interest.

> *United States v. Corbett*, 215 U. S. 233, 54 L. Ed. 594;
>
> *United States v. Bramblett*, 348 U. S. 503, 99 L. Ed. 594;
>
> *United States v. Turley*, 352 U. S. 407, 1 L. Ed. 2d 430.

The language used in similar statutes has been judicially condoned by the Supreme Court of the United States.

> ". . . any person shall be regarded as practicing medicine within the meaning of this act. . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."
>
> *Collins v. Texas*, 223 U. S. 288, 56 L. Ed. 439.

A statute which permitted the State Board of Dental Examiners to revoke the license of any dentist for gross violations of professional duties or for incompetency, was held to be not so indefinite as to violate the due process clause.

> *State Dental Examiners v. Savelle*, 90 Colo. 177, 8 P. 2d 693, 82 A. L. R. 1176, Appeal dismissed: 287 U. S. 562, 77 L. Ed. 496.

The language of Section 2141 is a far cry from creating any disability in a reasonable man to discern whether or not the words used charge a public offense. The mandate is simple: Don't practice medicine without a license.

IV.

The Procedural Guarantees of Due Process Were Not Offended in the Trial of This Case.

1. Exclusion of Evidence at the Trial of Petitioner Is Not a Proper Issue to Be Considered by This Court.

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, is conclusive on the federal courts in determining the question of validity of the statute under the federal constitution.

> *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643.

The reception or denial of evidence may be challenged on appeal but it cannot be used in a habeas corpus proceeding.

> *Eberhardt v. United States*, 262 F. 2d 421.

V.

The Application of Section 2141 of the Business and Professions Code of the State of California to the Petitioner Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

The mere fact that so-called drugless practitioners may currently escape prosecution under Section 2141 for *ultra vires* acts, does not give the chiropractor grounds to complain because he falls within its scope. A chiropractor has different rights, powers, privileges and immunities from the "drugless practitioner." He is governed by the results of an initiative election rather

than by an act of the Legislature. He is not accountable to the California Board of Medical Examiners, as are the so-called drugless practitioners.[2] He has limitations, as do mid-wives and chiropodists.

Furthermore, there is no right to practice chiropractic. It is a mere privilege that can be withdrawn by the People of California.

A statute is constitutional when it applies uniform rules of conduct for all those coming within the scope of its application and may not be challenged because of any denial of "equal protection of the law" to those on whom it operates, because others differently situated and within a different legal classification may not be affected by its terms.

> *People v. Sullivan* (1940), 60 Cal. App. 2d 539, 141 P. 2d 230.

There is no violation of equal protection where a legislative discrimination reflects the fact, in legislative beliefs, that evils in the same field are of different dimensions and proportions, requiring different remedies, or when the discrimination occurs as a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind.

> *Williamson v. Lee Optical of Oklahoma*, 348 U. S. 483, 99 L. Ed. 563.

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[2] "Drugless Practitioners" were abolished in 1949 by Sec. 2232, Business & Professions Code (Stats. 1949, ch. 233, p. 458, sec. 5).

The deference due to the judgment of a state Legislature in the matter of statutory classification alleged to deny equal protection of the laws, is especially to be observed when local conditions, which the court cannot know, may affect the answer to the critical question of whether the court can say, on its judicial knowledge, that the Legislature could not have had any reasonable ground for believing that there were such public considerations as to justify the distinction made.

Dominion Hotel v. State of Arizona, 249 U. S. 265, 63 L. Ed. 597.

The Legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

West Coast Hotel v. Parrish, 300 U. S. 379, 81 L. Ed. 703.

While the Constitution, in enjoining the legal protection of the laws upon states, precludes irrational discrimination as between persons and groups of persons in the incidence of a law, it does not require situations which are different in fact or opinion to be treated in law as though they are the same.

Goesaert v. Cleary, 335 U. S. 464, 93 L. Ed. 163.

VI.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of the petitioner's constitutional rights under the Federal Constitution. It represents merely a plaint of dissatisfaction with California judicial interpretation of its own law by a person whose license in the healing art exists solely by virtue of a privilege.

Petitioner's apparent desire as manifested by the allegations of his petition was succinctly disposed of years ago by Mr. Justice Holmes in *Collins v. Texas* (233 U. S. 288, 56 L. Ed. 439, 444), with the observation:

> "In short, the statute says that if you want to do what it calls practicing medicine, you must have gone to a reputable school of that kind of practice."

Respectfully submitted,

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APPENDIX A.

Section 17.

(Stats. 1917, Ch. 81, p. 114)

Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, or who shall in any sign or in any advertisement use the word "doctor," the letters or prefix "Dr.", the letters "M.D.", or any other term or letters indicating or implying that he is a doctor, physician, surgeon, or practitioner, under the terms of this or any other act, or that he is entitled to practice hereunder, or under any other law without having at the time of so doing a valid unrevoked certificate as provided in this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished as designated in this act.

APPENDIX B.

Minutes.

District Court of Appeal, State of California, Second Appellate District, Division One.

Los Angeles, July 30, 1959.

Crim. 6798—In re Dayan on Habeas Corpus.

The Court: Upon the authority and for the reasons stated in *People v. Fowler,* 32 Cal. App. 2d Supp. 737 and *People v. Mangiagli,* 97 Cal. App. 2d Supp. 935, the petition for writ of habeas corpus is denied.

WHITE, *P. J.*